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TEONG KOK KONG

v.

YOAHAN MARKETING (M) SDN BHD &amp; ORS

*b*

HIGH COURT MALAYA, KUALA LUMPUR

WAN AFRAH JC

[APPLICATION NO: R2-25-35-2002]

6 APRIL 2004

*c*

**LABOUR LAW:** *Industrial court - Award - Non compliance - Joining parties - IC held that applicant could not apply to join parties at non compliance proceedings - Whether IC committed an error of law - Jurisdiction - Whether IC acted in excess of jurisdiction*

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**ADMINISTRATIVE LAW:** *Remedies - Certiorari and mandamus - Application to quash award of Industrial Court denying applicant's right to join parties at non compliance proceedings - Whether application should have been made in dismissal proceedings - Words "in any proceedings before it" as contained in s. 29(a) of the Industrial Relations Act 1967 - Whether includes proceedings under s. 56 of the Industrial Relations Act 1967*

*e*

This was an application for an order of *certiorari* to quash the award of the Industrial Court (IC) as well as an order of *mandamus* directing the said case to be remitted to the IC for re-adjudication by another chairman and panel members to hear his application for a joinder of parties pursuant

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to s. 29(a) of the Industrial Relations Act 1967 ('the Act'). The applicant was an employee with Yoahan Marketing (M) Sdn Bhd (first respondent) and upon his dismissal, filed a claim for reinstatement pursuant to s. 20(3) of the Act. The IC in its award had found that the applicant had been unjustly dismissed and awarded him the sum of RM110,000 as backwages

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and compensation in *lieu* of reinstatement. Subsequently the first respondent failed to comply with the order to pay the said sum and the applicant filed non-compliance proceedings pursuant to s. 56(1) of the Act and thereupon made an application to join the second, third and fourth respondents as parties. The IC held that the applicant could not apply to join the parties

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at the non-compliance complaint proceedings stage. Dissatisfied with the IC's refusal to hear the joinder application on its merit, the applicant argued that the IC had erred in law pertaining to its jurisdiction and failed to take into account relevant factors and cases submitted before it.

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**Held (allowing the application):**

[1] The words “in any proceedings before it” as contained in s. 29(a) of the Act means that it encompasses all proceedings under the Act, which clearly includes non-compliance proceedings under s.56 of the Act. In the light of this, there was no reason why the IC should not have heard the joinder application as there was nothing in either s.29(a) or s.56 of the Act that prohibits a joinder application from being made at non-compliance proceedings. (p 555 f)

[2] The IC had committed an error of law when it dismissed the applicant’s application for joinder because it was made at the non-compliance proceedings. Further, the IC chairman was wrong and had acted in excess of his jurisdiction when he decided the matter on a preliminary issue and dismissed the joinder application without hearing the merits of the same. (p 555 g-h)

*[Application allowed; the court quashed the award handed down by the Industrial Court and remitted the case for re-adjudication before another chairman of the IC for a proper hearing on the merits of application for joinder as allowed under s. 29(a) of the Industrial Relations Act 1967.]*

**Case(s) referred to:**

*Marathaei Sangulullai & Anor v. Syarikat JG Containers (M) Sdn Bhd & Anor*  
[2003] 2 CLJ 96 CA (foll)  
*Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v. Mariam Sheikh Mohd Shafi* [1991] ILR 160 (refd)

**Legislation referred to:**

Industrial Relations Act 1967, ss. 20(3), 29(a), 56(1)

*For the applicant - Jaspal Singh Gill; M/s Raghbir Singh Norizan & Co*  
*For the 1st-4th respondents - P Thavaselvi; M/s Zul Rafique & Partners*

*Reported by Suhainah Wahiduddin*

**JUDGMENT**

**Wan Afrah JC:**

This was an application for an order of *certiorari* to quash the award of the Industrial Court (hereinafter referred to as the “IC”) No. 148 of 2002 dated 25 February 2002 in Case No. 1/1-863-2001 by one Mr Teong Kok Kong (hereinafter referred to as the “applicant”).

- a* Also included in this application was an order of mandamus directing that the said case be remitted to the IC for re-adjudication by another Chairman and panel members to hear his application for a joinder of parties pursuant to s. 29(a) of the Industrial Relations Act 1967.

**Facts Of The Case**

- b* The applicant was an employee with Yoahan Marketing (M) Sdn Bhd (hereinafter referred to as the “1st respondent”) and upon his dismissal, filed a claim for reinstatement pursuant to s. 20(3) of the Industrial Relations Act of 1967. The matter was referred to the IC *vide* Case No. 4/4-419/99.
- c* The IC in its Award No. 537 of 2001 dated 16 July 2001 (hereinafter referred to as the “1st award”) found that the applicant had been dismissed without just cause or excuse by the 1st respondent and awarded him the sum of RM110,000 as backwages and compensation in lieu of reinstatement.
- d* Subsequently, when the 1st respondent failed to comply with the order to pay the said sum as per the 1st award, the applicant filed non-compliance proceedings pursuant to s. 56(1) of the IRA 1967 and thereupon, made an application to join the 2nd and 3rd respondent (the directors of the company) and the 4th respondent (the holding company) as parties pursuant to s. 29(a) of the IRA 1967. The non-compliance complaint proceedings were registered as IC case No. 1/1-863/01 and an affidavit to that effect was filed by the applicant. The IC fixed the complaint to be mentioned on 17 October 2001.
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- f* On the said date, the IC ordered the parties proposed to be joined to file an affidavit in reply and fixed the joinder application for inter parties hearing on 4 February 2002. By virtue of r. 3(1) of the Industrial Relations Rules 1967, the parties proposed to be joined filed Form a and B, which allows the joined parties to be represented by legal counsel. On 19 November 2001, the parties proposed to be joined filed an affidavit in reply opposing the joinder application.
- g* At the inter parties hearing held on 4 February 2002, counsel for the proposed joined parties objected to the joinder application and contended that the IC should hear and determine a preliminary point of law – Whether the applicant could file an application to join parties pursuant to s. 56(1) of the IRA 1967, ie, whether there could be a joinder of parties during the non-compliance complaint proceedings.
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The IC, after hearing submissions on the issue mentioned above, handed down Award No. 148 of 2002, wherein it held that the applicant could not apply to join parties at the non-compliance complaint proceedings stage. The award read as follows: a

In the court's opinion the two Directors were not heard in their capacity as employers but were heard as witnesses of the Company. Hearing the holding Company at the non-compliance proceeding is not sufficient. It should be heard in the dismissal proceedings. b

The Court considered the submission of learned Counsel and is of the opinion that the decision in *Melewar Trading Corporation Sdn Bhd v. Melewar Guangdong Trade & Development Corporation v. Marian bt Sheikh Mohd Shafi* [1991] 1 ILR 160 is a right decision and should be followed. The case before this Court in on all fours with the authority cited. The Court also agrees that it is contrary to the rule of natural justice in that the proposed third parties did not have the opportunity of being heard at the hearing of the dismissal case. For these reasons, the application is dismissed. c  
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Dissatisfied with the IC's refusal to hear the joinder application on its merit, the applicant filed an application for judicial review to quash the Award No 148 of 2002 on the ground that the IC had erred in law pertaining to its jurisdiction and failed to take into account relevant factors and cases submitted before it. e

#### Issues For Determination

The crux of the case before me was:

- (i) Did the IC commit an error of law and act in excess of its jurisdiction when it dismissed the applicant's joinder application that was made during the non-compliance proceedings based on the facts and circumstances of the case? and f
- (ii) Did the IC commit an error of law and act in excess of jurisdiction when it decided on a preliminary issue and dismissed the joinder application without hearing the same on it's merits? g

In response to the issues before me, counsel for the respective parties submitted their arguments. In essence, their arguments are as follows: h

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**a Respondent's Counsel Submitted**

1. That the IC has no jurisdiction under s. 56 of the Industrial Relations Act 1967 to hear a joinder application. The jurisdiction of the IC was limited to purely performing the function of enforcing the 1st award.
- b** 2. That the IC in exercising its discretion to allow a joinder of parties under s. 29(a) of the Act must employ such discretion judicially and with full regard to the rules of natural justice ie, the parties proposed to be joined must be given the opportunity of being heard.
- c** 3. That there cannot be a joinder of parties at non-compliance proceedings stage as the parties proposed to be joined had not been given the opportunity of being heard in respect of the 1st award.
4. That the applicant should not have made the joinder application after the 1st award was handed down. It was too late at this stage at the proceedings to make such an application.
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**Applicant's Counsel Submitted**

1. That the court has the jurisdiction to allow a joinder application "in any proceedings before it: (a) order that any party be joined, substituted of struck off ..." as stated under s. 29(a) of the Industrial Relations Act 1967. Such words expressed "in any proceedings" encompassed proceedings under s. 56 of the Act.
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2. That the IC had committed an error of law when it disregarded the words "in any proceedings" used in a statute – as expressed to mean as such.
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3. That the IC did not hear the application for joinder on its merits. Instead, the IC dismissed the application during the preliminary objection based on *Melewar Trading Corporation Sdn Bhd & Melewar Guangdong Trade & Development Corporation v. Mariam bt Sheikh Mohd Shafi* [1991] ILR 160. In the said case, the learned President Mr Tan Kam Weng held as follows:
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- It appears to us that s. 29 gives the Court the power to do all such things as are necessary in any proceedings before the award is made. Once an award is made, we hold the view that the court has no power to join a third party for the purpose of satisfying the award, as that third party has not been given the opportunity to being heard before the award was entered into against it. The Claimant has knowledge of the existence of the holding company and should have
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made the application to join the holding company in the proceedings before the award was made. She made no such move to make the application. It is too late in the day for her to make the application now. We are, therefore, of the view that the claimant's application is misconceived and we accordingly dismiss it.

### Court's Findings

1. To me, by virtue of s. 29(a) of the Industrial Relations Act 1967 which states: "The court may in any proceedings before it: (a) order that any party be joined, substituted or struck off ...", allows the IC to hear the application for joinder made by the applicant even during non-compliance proceedings under s. 56 of the Act. a
2. I adopt the principle in *Marathaei Sangulullai & Anor v. Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 CLJ 96, where the Court of Appeal, in defining the words "In any proceedings before the court", held that it includes proceedings under s. 56 of the Act. In the said case, Gopal Sri Ram JCA whilst referring to the construction of s. 27(1) held – "The opening words of the section are very clear. And they are very wide indeed. They read "In any proceedings before the court". These words must be taken to mean what they say. "Any proceedings must mean "any proceedings under the Act". So, they must include non-compliance proceedings under s. 56 of the Act." b
3. Similar to the Court of Appeal case cited above and in the present case before me, the words "in any proceedings before it" as contained in s. 29(a) of the Industrial Relations Act 1967, means it encompass all proceedings under the Act, which clearly includes non-compliance proceedings under s. 56 of the Act. In the light of this, I find no reason why the IC should not have heard the joinder application before him as there is nothing in either s. 29(a) or s. 56 of the Act that prohibits a joinder application from being made at non-compliance proceedings. c
4. It is obvious to me that the IC committed an error of law when it dismissed the applicant's application for joinder because it was made at the non-compliance proceedings. Further, the IC chairman was wrong and had acted in excess of his jurisdiction when he decided the matter on a preliminary issue and dismissed the joinder application without hearing the merits of the same. d

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*a*     **Conclusion**

Accordingly, I hereby quash the subsequent Award No. 148 of 2002 and remit the case for readjudication before another Chairman of the IC for a proper hearing on the merits of the application for joinder as allowed under s. 29(a) of the Industrial Relations Act 1967.

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